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And it's Beginning to Snow

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AND IT'S BEGINNING TO SNOW¹

INTRODUCTION

Where does a person go when there is nowhere to go? Maybe the person cannot afford a place to live. Or maybe the person is fleeing home to escape violence or abuse. What if it is nighttime? Everyone needs to sleep. The person may find a homeless shelter. But it might be past check-in time. Or the person might instead need to fuel an addiction.² And the person might have to leave personal belongings behind to enter the shelter. What happens when there are not enough homeless shelters to shelter all the homeless? Sure, people can sleep outside.

But what if it is snowing?³

A class of homeless people asked the City of Boise, Idaho this question in 2010.⁴ The resulting case—*Martin v. City of Boise*⁵—created shock waves throughout cities in the Ninth Circuit. To much surprise, the Ninth Circuit Court of Appeals held that enforcing anti-camping laws against homeless individuals constitutes cruel and unusual punishment under the Eighth Amendment if no other shelter is available to them.⁶ The City of Boise, with the support of several other

1. JONATHAN LARSON, CHRISTMAS BELLS (Rent 1994).

2. “Low barrier” shelters are shelters that accept people under the influence of drugs or alcohol, but most shelters in the United States impose barriers on addicts. Al Shapiro, *Why Some Homeless Choose the Streets Over Shelters*, TALK OF THE NATION (Dec. 6, 2012), <https://www.npr.org/2012/12/06/166666265/why-some-homeless-choose-the-streets-over-shelters>.

3. “The National Coalition for the Homeless estimates that 700 people on the streets die from hypothermia every year in the U.S.” *Id.*

4. *See* Bell v. City of Boise, 709 F.3d 890, 893 (9th Cir. 2013).

5. Formerly Bell v. City of Boise. *Id.* *See also* Cassidy Waskowicz, *Homeless Persons Cannot Be Punished in Absence of Alternatives*, 9th Circuit Decision Establishes, NAT'L LAW CTR. ON HOMELESSNESS & POVERTY (Apr. 1, 2019), <https://nlchp.org/homeless-persons-cannot-be-punished-for-sleeping-in-absence-of-alternatives-9th-circuit-decision-establishes/>.

6. *See* Martin v. City of Boise, 920 F.3d 584, 603 (9th Cir. 2019); *see also* U.S. CONST. amend. VIII; Scott Greenstone, *How a Federal Court Ruling on Boise's*

cities,⁷ contested this holding and petitioned for writ of certiorari to the Supreme Court of the United States.⁸ The challenge, however, was unsuccessful. On December 16, 2019, the Supreme Court denied Boise's petition, refusing to reverse the Ninth Circuit's decision, but also declining to expand the scope of the decision nationwide.⁹

Although some critics argue the *Martin* decision is insufficient to effect a lasting change to homelessness,¹⁰ it is a significant step in the right direction for three reasons. First, *Martin* builds upon a social trend to increase constitutional protections for indigency and empowers homeless people to advocate for themselves. Second, lawsuits following *Martin* have produced desirable effects, such as requiring municipalities to provide much-needed homeless services and build or improve homeless facilities. And third, the decision fosters social experiments, the outcomes of which may revolutionize problem-solving tactics used to address homelessness.

Part I of this Note proceeds with an overview of the U.S. homeless crisis, particularly in California, and the responding effort by cities to criminalize homelessness. Part II discusses how the Eighth Amendment's Cruel and Unusual Punishments Clause became a vehicle to challenge the criminalization of homelessness. Part III then examines *Martin v. City of Boise*, and how cities in the Ninth Circuit are reacting to the decision. Finally, Part IV contends the United States Supreme Court was correct in denying the City of Boise's Petition for

Homeless Camping Ban Has Rippled Across the West, IDAHO STATESMAN (Sept. 16, 2019), <https://www.idahostatesman.com/news/local/community/boise/article235065002.html>.

7. Municipal *amici curiae* included the City of Aberdeen, Washington; the cities of Orange County, California; and the City of Los Angeles, California. See *City of Boise, Idaho v. Martin*, SCOTUSBLOG (Dec. 16, 2019), <https://www.scotusblog.com/case-files/cases/city-of-boise-idaho-v-martin/> [hereinafter SCOTUSBLOG]. There was also state support from Idaho, Alaska, Indiana, Louisiana, Nebraska, South Dakota, and Texas. *Id.*

8. See generally Petition for Writ of Certiorari at 26–35, *City of Boise v. Martin*, 140 S. Ct. 674 (2019) (No. 19-245) [hereinafter Petition].

9. *City of Boise v. Martin*, 140 S. Ct. 674 (2019).

10. See Erik Larson, *Legal Constraints Changed the Dynamic in Homeless Response, but the Problem Needs Long-term Solution, Anyway*, DAILY WORLD (Dec. 18, 2019), <https://www.thedailyworld.com/opinion/legal-constraints-changed-the-dynamic-in-homeless-response-but-the-problem-needs-long-term-solution-anyway/>.

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Writ of Certiorari. Overturning *Martin* would (1) deny homeless people of a vehicle to challenge discriminatory laws which criminalize their status, (2) halt municipal efforts to increase homeless services and facilities, and (3) stifle social experimentation that seeks a solution to homelessness.

I. BACKGROUND: A GLIMPSE INTO THE HOMELESS CRISIS

According to the United States Department of Housing and Urban Development (“HUD”), “[o]n a single night in 2018, roughly 553,000 people were experiencing homelessness in the United States,” and about one-third of those people were unsheltered.¹¹ Furthermore, for the second year in a row, homelessness has increased.¹² Homelessness affects people of diverse backgrounds,¹³ including families, veterans, people of color, the mentally ill, substance abusers, victims of domestic violence, and people living with disabilities.¹⁴ Veterans and minorities are disproportionately overrepresented; and families with children are among the fastest growing groups within the homeless population.¹⁵

Half of all homeless people are concentrated in only five states,¹⁶ but California contains the highest homeless population by far. With almost 130,000 homeless people, California holds an entire quarter of

11. Unsheltered locations include the street, abandoned buildings, and “other places not suitable for human habitation.” MEGHAN HENRY ET AL., U.S. DEPT. HOUSING & URB. DEV., THE 2018 ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS 1 (Dec. 2018) [hereinafter AHAR].

12. Between 2017 and 2018, homelessness increased .03%. *Id.* During that same timeframe, the unsheltered homeless population increased by two percent, or roughly 4,300 people. *Id.*

13. Farida Ali, *Limiting the Poor's Right to Public Space: Criminalizing Homelessness in California*, 21 GEO J. POVERTY L. & POL'Y 197, 202 (2014) (noting “homelessness in California affects individuals of diverse racial backgrounds, sexes, and age ranges”).

14. See generally Sarah Finnane Hanafin, *Legal Shelter: A Case for Homelessness as a Protected Status Under Hate Crime Law and Enhanced Equal Protection Scrutiny*, 40 STETSON L. REV. 435, 440–42 (2011).

15. *Id.* at 440–41; see also AHAR, *supra* note 11, at 1 (“In 2018, more than 180,000 people in families with children were experiencing homelessness, and most people experiencing homelessness in families with children were staying in sheltered locations (91%).”).

16. AHAR, *supra* note 11, at 14 (listing California, New York, Florida, Texas, and Washington as the five states containing half of the nation's homeless population).

the nation's total homeless population.¹⁷ Moreover, it was estimated that a staggering 68.8% of California's homeless are unsheltered.¹⁸ That number is more than double the national percentage of unsheltered homeless people.¹⁹

A. Health and Safety Concerns of Homelessness, for Individuals, and for the Public

Internally, homelessness adversely effects the health and wellbeing of individuals experiencing homelessness.²⁰ Statistically, homeless people suffer health issues at significantly higher rates than those more fortunate.²¹ In fact, poor health is often what causes people to become homeless in the first place.²² Homelessness exacerbates stress-related diseases affecting mental health and addiction.²³ A poor diet may lead to medical conditions, like metabolic syndrome and heart disease.²⁴ And viruses, such as Hepatitis C and Human Immunodeficiency Virus/Acquired Immunodeficiency Syndrome ("HIV/AIDS"), are major health problems homeless people face.²⁵ Treatment of these

17. In 2018, California's homeless population reached 129,972 people, representing twenty-four percent of the nation's total homeless population. *Id.*

18. *Id.* at 15.

19. *Id.* at 26.

20. See generally Joshua D. Bamberger, *Top 7 Health Problems of the Homeless*, MERCY HOUSING (Aug. 25, 2016), <https://www.mercyhousing.org/2016/08/top-7-health-problems-of-the-homeless/>.

21. "In one study, more than 8 out of 10 people (85%) experiencing homelessness reported having a chronic health condition." Emma Woolley, *What Are the Top 10 Health Issues Homeless People Face?*, HOMELESS HUB (Feb. 6, 2015), <https://www.homelesshub.ca/blog/what-are-top-10-health-issues-homeless-people-face>.

22. For example, "many people with schizophrenia who are homeless are caught in a revolving door, cycling through jails, hospitals, and shelters, only to end up on the street, ill as ever." Bamberger, *supra* note 20. Additionally, "addiction can lead to homelessness." *Id.*

23. Taylor A. F. Wolff, Note, *Housing Is Healthcare: The Tax Implications of Homelessness and Addiction*, 21 QUINNIPIAC HEALTH L.J. 259, 264 (2018).

24. Bamberger, *supra* note 20.

25. *Id.*

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conditions becomes difficult and often ineffective when patients lack stable shelter in which they may recover.²⁶

Additionally, homeless people often fall victim to violent, unprovoked crimes.²⁷ Between 1999 and 2007 alone, there were a reported 1,769 acts of violence against homeless people in the United States, 476 of which resulted in death.²⁸ California leads the nation in these hateful crimes.²⁹ For example, in 2016, one man brutally attacked four sleeping homeless people in San Diego, California, setting them on fire.³⁰ His violent spree left three dead and one with serious injuries.³¹ More recently, in 2018, an assailant doused a homeless couple with battery acid while they slept in a Los Angeles park.³² Without the protection of shelter, homeless people are easy targets of hate.³³

Externally, homelessness also impacts the broader communities in which it exists. For example, homelessness can pose serious public health risks. Disease outbreaks, such as hepatitis and influenza, easily spread throughout communities with high homeless populations.³⁴ Fire

26. "In order for treatment to be effective, patients need homes." *Id.* Studies show treatment of HIV/AIDS does not improve the life expectancy of homeless people to the extent it does for those with homes. *Id.*

27. See Hanafin, *supra* note 14, at 450–51.

28. *Remembering Those Lost to Homelessness*, NAT'L COAL. FOR THE HOMELESS (Dec. 21, 2018), <https://nationalhomeless.org/remembering-those-lost-to-homelessness/>.

29. Morgan Cook & Lauryn Schroeder, *California Leads the Nation in Homeless Attacks*, SAN DIEGO UNION TRIB. (July 14, 2016), <https://www.sandiegouniontribune.com/news/data-watch/sdut-homeless-attacks-report-2016jul14-story.html>

30. *Id.*

31. *Id.*

32. *LA Homeless Attacks Prompt Hate Crime Reform*, PATCH MEDIA (Nov. 27, 2018), <https://patch.com/california/hollywood/amp/27818733/la-homeless-attacks-prompt-hate-crime-reform>.

33. Caille Millner, *Uncertainty Over Creating Another Class of Hate Crimes to Protect Homeless*, S.F. CHRON. (May 3, 2019), <https://www.sfchronicle.com/entertainment/article/Uncertainty-over-creating-another-class-of-hate-13815508.php> (noting "homeless people are uniquely vulnerable to targeted violence").

34. GIBSON DUNN, MARTIN V. CITY OF BOISE WILL ENSURE THE SPREAD OF ENCAMPMENTS THAT THREATEN PUBLIC HEALTH AND SAFETY 5–6,

hazards³⁵ and higher crime rates associated with homelessness also increase the overall risk to public safety.³⁶ Homelessness thus creates monetary costs to the public, including increased healthcare expenses for disease treatment, social service expenses allocated to provide short term housing, and expenditures to transport homeless individuals to and from service facilities.³⁷ These expenses create a burden on already strained public resources.

B. Criminalizing Homelessness

Every human requires rest, nourishment, and protection to survive.³⁸ The difference is, every day, homeless Americans fight for these basic human needs that the rest of the country takes for granted. Outlawing the means to meet these needs leaves destitute individuals with very few options.³⁹

Municipalities criminalize homelessness in various ways. Anti-loitering statutes, for example, make it illegal to sleep in a public area.⁴⁰ These statutes ensure pedestrian thoroughfares remain clear for the public's use by prohibiting a person from remaining on public pathways in a way that unreasonably obstructs or interferes with the free passage of traffic.⁴¹ When someone sleeps on a public street or sidewalk, they block the path for pedestrians and thus violate the statute. As a result,

<https://www.gibsondunn.com/wp-content/uploads/2019/08/Martin-v.-Boise-White-Paper.pdf> (last visited Mar. 14, 2020).

35. *Id.* at 7.

36. *Id.* at 6–7.

37. Wolff, *supra* note 23, at 264–65.

38. Sara K. Rankin, *Punishing Homelessness*, 22 NEW CRIM. L.R. 99, 107 (2019).

39. Examples of laws that criminalize behavior necessary to survival include “laws that prohibit sitting, standing, sleeping, receiving food, going to the bathroom, asking for help, or protecting one’s self from the elements.” *Id.*

40. *A Dream Denied: The Criminalization of Homelessness in U.S. Cities*, NAT’L COAL. FOR THE HOMELESS, <https://www.nationalhomeless.org/publications/crimreport/constitutional.html> (last visited Jan. 16, 2020) [hereinafter *A Dream Denied*].

41. *See, e.g.*, L.A., CAL., MUN. CODE § 41.18 (prohibiting loitering on or around sidewalks, tunnels, subways, bridge overpasses, or retaining walls to streets or highways).

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homeless people can face criminal sanctions for using public spaces to rest or sleep.

Similar laws, namely encroachment statutes, target personal property rather than people. Encroachment statutes prohibit individuals from using public areas to store their belongings.⁴² When abandoned—even for a moment—the property is at risk of being stolen, seized, or thrown away by sanitation crews.⁴³ Similar to anti-loitering statutes, encroachment statutes are generally intended to clear the passage of public thoroughfares. In practicality, however, cities use these statutes to force homeless people to move their property or risk losing it.⁴⁴ These laws require homeless individuals to continuously relocate both themselves and their possessions.⁴⁵ With limited means of transportation and storage options, this added burden often forces these individuals to abandon their personal property.⁴⁶

A more recent legislative trend criminalizes homelessness by prohibiting vehicle habitation. In fact, “[b]anishing vehicle residency is one of the fastest growing forms of criminalization.”⁴⁷ For example,

42. See, e.g., SAN DIEGO, CAL. MUN. CODE § 54.0110 (making it illegal for a person to place any object on public property).

43. See Gary Warth, *Storage Center for Homeless Opens in Sherman Heights*, SAN DIEGO UNION TRIB. (June 12, 2018), <https://www.sandiegouniontribune.com/news/homelessness/sd-me-storage-preview-20180611-story.html>; see also NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, VIOLATIONS OF THE RIGHT TO PRIVACY FOR PERSONS EXPERIENCING HOMELESSNESS IN THE UNITED STATES 1 (May 31, 2017), <https://nlchp.org/wp-content/uploads/2018/10/Special-Rapporteur-Right-to-Privacy.pdf>.

44. This trend has become even more obvious recently with the popularity of bike-sharing companies. See Lisa Halverstadt, *Dockless Bikes Encroach on San Diego's Enforcement Against Homeless Residents*, VOICE OF SAN DIEGO (Mar. 19, 2018), <https://www.voiceofsandiego.org/topics/government/dockless-bikes-encroach-san-diegos-enforcement-homeless-residents/>. While homeless people continue to be warned and ticketed for keeping their property on public sidewalks, encroachment violations are not enforced to the same degree for these bike-share companies. *Id.*

45. See Complaint at 2, *Arundel v. City of San Diego*, No. 17-CV-01433 (S.D. Cal., July 17, 2017) (noting “nobody can perpetually carry their belongings”).

46. See *id.* at 8.

47. T. Ray Ivey, Note, *The Criminalization of Vehicle Residency and the Case for Judicial Intervention via the Washington State Homestead Act*, 42 SEATTLE U. L. REV. 243, 244 (2018) (noting “cities with ordinances that effectively criminalized

in May 2019, the City of San Diego passed an ordinance that prohibits people from living in vehicles between the hours of nine at night and six in the morning.⁴⁸ The ordinance further prohibits residing in vehicles at any time within five hundred feet of a residential building or a school.⁴⁹ Evidence that an individual is living in his or her vehicle may include a wide variety of activities,⁵⁰ not limited to sleeping. Law enforcement officers may use observations of bedding, food, and personal items as evidence of a violation.⁵¹

Those caught violating anti-encroachment, anti-loitering, and vehicle habitation statutes often face civil infractions and are primarily punished with penalties like tickets.⁵² These fines are particularly burdensome for a population earning little to no income.⁵³ Additionally, fines and fees can potentially swell with late payment penalties,⁵⁴ and even evolve into misdemeanors, resulting in a criminal record.⁵⁵ A criminal charge may lead to heavy consequences for a

vehicle habitation increased by 119% between 2011 and 2014” according to a 2014 survey by the National Law Center).

48. SAN DIEGO, CAL., MUN. CODE § 86.0137(f) (making it “unlawful for any person to use a vehicle for human habitation” on a public street or on public property within five hundred feet of a school or residential building).

49. *Id.* at § 86.0137(f)(2)–(3).

50. The following observations are evidence of human habitation in a vehicle: sleeping, bathing, and preparing meals inside or around the vehicle; possession of items such as sleeping bags, blankets, sheets, pillows, food, water, personal grooming items, and camping gear; surrounding litter or waste; and surrounding furniture like chairs, tables, and umbrellas. *Id.* at § 86.0137(f)(4).

51. *Id.*

52. Rankin, *supra* note 38, at 107.

53. *Id.*

54. In California, failure to pay a traffic ticket on time could result in a “civil assessment’ of up to \$300,” have the ticket referred for collection, or “the court could issue a warrant for your arrest” and “charge you with a misdemeanor or infraction for ‘failure to pay.’” *If You Ignore Your Ticket*, CAL. COURTS, <https://www.courts.ca.gov/9540.htm?rdeLocaleAttr=en> (last visited Feb. 17, 2020).

55. Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1316–17 (2012). Other laws attach criminal punishments from the onset. For example, “[l]iving in public [could] trigger[] criminal charges, such as loitering or trespassing.” Rankin, *supra* note 38, at 107.

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homeless individual—a misdemeanor alone could bar a person from receiving government aid or admission into shelters.⁵⁶

II. THE EIGHTH AMENDMENT PROTECTION AGAINST CRUEL AND UNUSUAL PUNISHMENTS

The Eighth Amendment of the U.S. Constitution states “excessive bail shall not be required, nor excess fines imposed, nor cruel or unusual punishments inflicted.”⁵⁷ The U.S. Supreme Court delineated three ways the Amendment’s third prohibition—the Cruel and Unusual Punishments Clause—may overcome the criminal process.⁵⁸ First, the clause “limits the kinds of punishments that can be imposed.”⁵⁹ Second, the clause prevents punishments that are “grossly disproportionate to the severity of the crime committed.”⁶⁰ Finally, the clause places “substantive limits on what may be made criminal and punished as such.”⁶¹

A. *The Cruel and Unusual Punishments Clause and “Status” Crimes*

The U.S. Supreme Court first used the Cruel and Unusual Punishments Clause’s substantive limitation to invalidate the illegality of a person’s “status” in the 1962 case, *Robinson v. California*.⁶² The

56. See HUMAN RIGHTS WATCH, NO SECOND CHANCE 46 (Nov. 17, 2004), <https://www.hrw.org/report/2004/11/17/no-second-chance/people-criminal-records-denied-access-public-housing>; see also Natapoff, *supra* note 55, at 1316 (noting a “petty conviction can affect eligibility for professional licenses, child custody, food stamps, student loans, health care, or lead to deportation”).

57. U.S. CONST. amend. VIII.

58. *Ingram v. Wright*, 430 U.S. 651, 667 (1977).

59. *Id.* (citing e.g. *Estell v. Gamble*, 429 U.S. 97 (1976) (prohibiting incarceration without medical care)).

60. *Ingram*, 430 U.S. at 667 (citing e.g. *Weems v. U.S.*, 217 U.S. 349 (1910) (holding a sentence of fifteen years for falsifying documents is disproportionately severe)).

61. The third limitation should be “applied sparingly.” *Ingram*, 430 U.S. at 667 (citing e.g. *Robinson v. California*, 370 U.S. 660 (1962) (prohibiting the criminalization of narcotics addiction)).

62. *Robinson*, 370 U.S. at 666. The issue there was whether a California statute that criminalized narcotics addiction could be considered cruel and unusual under the Eighth Amendment. See *id.*

challenge was to a law targeting narcotics addiction.⁶³ The Court considered the involuntary nature of becoming an addict and held that criminalizing the status of addiction is cruel and unusual.⁶⁴ The Court reasoned a person could become a narcotics addict without ever having used narcotics within the state of California, explaining, “state law which imprisons a person thus afflicted as a criminal, even though he has never . . . been guilty of any irregular behavior there, inflicts cruel and unusual punishment.”⁶⁵

Six years after the *Robinson* decision, the U.S. Supreme Court again addressed the Eighth Amendment issue of criminalizing “status” in *Powell v. Texas*.⁶⁶ There, the Court distinguished between statutes that criminalize an illness, like addiction, and statutes that criminalize a behavior, like being intoxicated.⁶⁷ The Court explained that while *Robinson* prohibited the criminalization of an immutable characteristic, the illness of addiction, *Powell* considered whether cities may validly prohibit the voluntary act of intoxication in public.⁶⁸ The *Powell* Court was not persuaded by the argument that chronic alcoholics have no choice but to drink in public, and declined to invalidate the statute on Eighth Amendment grounds.⁶⁹ Instead, the Court upheld the statute, pointing to several social benefits of prohibiting public intoxication.⁷⁰

When deciding whether a statute violates the Eighth Amendment’s Cruel and Unusual Punishments Clause, the relevant inquiry is whether the statute punishes an individual’s involuntary acts or conditions

63. *Id.*

64. *Id.* at 667.

65. *Id.*

66. *Powell v. Texas*, 392 U.S. 514 (1968).

67. *Id.* at 532 (explaining the holding does not fall within *Robinson* because the defendant was not being convicted of being a chronic alcoholic, but rather for being drunk in public).

68. *Id.*

69. *Id.*

70. Justice Black, in his concurring opinion, expanded on the *Powell* Court’s reasoning for outlawing public drunkenness despite it being, at times, involuntary. *See id.* at 538 (Black, J. concurring). Justice Black pointed to the social benefits of prohibiting public intoxication, such as protecting public safety. *Id.* Additionally, there is a therapeutic value to providing an intoxicated person with shelter, clothing, food, and an opportunity to sober up. *Id.* Justice Black weighed these benefits against the cost to chronic addicts and concluded that the values served by the law were greater than the cost to addicts. *Id.* at 539–40.

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which are unavoidable consequences of the individual's status.⁷¹ A statute is unconstitutional if it imposes a criminal punishment for an action attributable to an individual's immutable characteristic.⁷²

B. The "Status" of Homelessness

In 2006, nearly forty years after *Powell*, a class of homeless plaintiffs in Los Angeles, California, used the Eighth Amendment's Cruel and Unusual Punishments Clause to confront the criminalization of homelessness.⁷³ The law at issue made it illegal to rest or sleep on any public sidewalk or public way,⁷⁴ and most heavily impacted an area of Los Angeles known as Skid Row.⁷⁵ At the time, the law was one of the most restrictive of its kind with remarkably high penalties.⁷⁶ Those caught violating the statute could face a one thousand dollar fine or up to six months in jail.⁷⁷ The case, *Jones v. City of Los Angeles*, reached the Ninth Circuit Court of Appeals, which ultimately invalidated the law.⁷⁸ The court found the law cruel and unusual, and therefore unconstitutional under the Eighth Amendment.⁷⁹ The case became the leading decision in favor of the principle gleaned from both *Robinson* and the *Powell* dissent—that immutable characteristics attributable to “status” may not be criminalized.⁸⁰

In reaching its decision, the *Jones* court strongly considered the involuntariness of the criminalized act or condition.⁸¹ The opinion

71. *Martin v. City of Boise*, 920 F.3d 584, 616 (9th Cir. 2019).

72. *Id.*

73. *See generally Jones v. City of Los Angeles*, 444 F.3d 1118 (9th Cir. 2006), *vacated*, 505 F.3d 1006 (9th Cir. 2007).

74. *Jones*, 444 F.3d at 1123 (challenging Los Angeles Municipal Code section 41.18, subdivision d, which makes it a crime to “sit, lie or sleep in or upon any street, sidewalk, or public way”).

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 1138.

79. *Id.*

80. David Rudin, “*You Can’t Be Here*”: *The Homeless and the Right to Remain in Public Space*, 42 N.Y.U. REV. L. & SOC. CHANGE 309, 313 (2018).

81. *Jones*, 444 F.3d at 1132 (applying *Robinson* and Justice White’s dissent in *Powell*).

raised two relevant distinctions in considering a state's power to criminalize an individual's status. First, it distinguished status and conduct.⁸² Second, it distinguished involuntary and voluntary conditions.⁸³ Homelessness, the court concluded, is a status; and sleep is an involuntary condition.⁸⁴ The Los Angeles law made it impossible for homeless people to sleep, thereby criminalizing the status of "homeless."⁸⁵ The court further found that punishing failure to obtain shelter for sleeping violates the Eighth Amendment's Cruel and Unusual Punishments Clause.⁸⁶

Importantly, the *Jones* court noted homelessness, like addiction and other immutable conditions, could be based on factors beyond an individual's immediate control.⁸⁷ However, the court highlighted its holding was narrow, not to be extended to *voluntary* conduct that is a consequence of homelessness.⁸⁸ While a municipality may not completely ban homeless individuals from carrying out basic biological needs such as sitting, lying, and sleeping in public, restricting such behavior is still constitutional under *Jones*.⁸⁹ Additionally, the *Jones* decision imposes no affirmative duty on municipalities to provide non-criminal means for homeless people to meet their basic biological needs.⁹⁰

82. *Id.* at 1136 (differentiating pure status, as the state of being, and pure conduct, as the act of doing).

83. *Id.*

84. *Id.*

85. The court reasoned that "human beings are biologically compelled to rest" and are unable to maintain perpetual motion. *Id.* at 1136–37.

86. *Id.* at 1136.

87. The *Jones* court noted "homelessness is not an innate or immutable characteristic, nor is it a disease, such as drug addiction or alcoholism." *Id.* at 1137. But it does include subgroups of homeless people that have immutable characteristics, like "the mentally ill, addicts, victims of domestic violence, the unemployed, and the unemployable." *Id.*

88. For example, "panhandling or obstructing public thoroughfares." *Id.*

89. The court recognized Los Angeles suffers from an obvious "'homeless problem' . . . which the City is free to address in any way that it sees fit," as long as it is consistent with the Constitution. *Id.* at 1138.

90. The decision "in no way dictate[s] to the City that it must provide sufficient shelter for the homeless." *Id.*

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III. BURDEN SHIFTING: MARTIN V. CITY OF BOISE

In 2019, the Ninth Circuit again changed the landscape of Eighth Amendment challenges to the criminalization of homelessness in *Martin v. City of Boise*.⁹¹ The court struck down a Boise City, Idaho, ordinance which made it a misdemeanor to camp on public property.⁹² At the time, there were only three homeless shelters in the City of Boise which offered emergency shelter services.⁹³ Those shelters were all operated by private, nonprofit organizations.⁹⁴ Furthermore, all three shelters had policies restricting admission and length of stay, as well as mandatory periods of time between stays.⁹⁵ The shelters, with limited resources, were unable to serve the City of Boise's entire homeless population.⁹⁶ Without shelter, Boise's homeless community turned to tents to protect themselves from the region's winter weather

91. The issue before the Ninth Circuit was whether “the Cruel and Unusual Punishments Clause preclude[s] the enforcement of a statute prohibiting sleeping outside against homeless individuals with no access to alternative shelter.” *Martin v. City of Boise*, 920 F.3d 584, 609 (9th Cir. 2019). At the district court level, the City of Boise won its summary judgment motion on all claims. *Id.* at 604. On appeal, however, the court found that the statute violated the Eighth Amendment. *Id.* at 615.

92. “[T]he ‘Camping Ordinance’[] ma[de] it a misdemeanor to use ‘any of the streets, sidewalks, parks, or public places as a camping place at any time.’ The Camping Ordinance define[d] ‘camping’ as ‘the use of public property as a temporary or permanent place of dwelling, lodging, or residence.’” *Id.* at 603–04 (quoting BOISE CITY CODE § 9-10-02).

93. *Id.* at 605.

94. *Id.* at 605–06.

95. One shelter, Sanctuary, did not exclude people based on gender, but reserved beds especially for families, and had to turn many individuals away due to its limited capacity. *Id.* at 605. The other two shelters were faith-based shelters that imposed religious restrictions, as well as restrictions on check-in times. *See id.* at 605–06 (noting homeless individuals checking into emergency shelters run by the faith-based organization had to do so between 4:00 p.m. and 5:30 p.m. or risk being denied shelter).

96. Sanctuary, for example, had a limited capacity of only ninety-six beds for individuals and only a few additional beds for families. *Id.* at 605.

conditions,⁹⁷ where the temperatures often reach freezing, and where it snows on a regular basis.⁹⁸

By prohibiting tents in public in the absence of sufficient alternative shelter, Boise's anti-camping statute made it impossible for homeless people to protect themselves without violating the law.⁹⁹ That, the Court of Appeals found, was cruel and unusual.¹⁰⁰ Like *Jones* and *Powell* before it, the *Martin* decision is a narrow one.¹⁰¹ Nonetheless, *Martin* is significant because it shifts the burden to provide shelter, at least to some degree, from homeless individuals to municipalities.

A. Municipal Responses to *Martin*

In the wake of *Martin*, constitutional challenges to the criminalization of homelessness are gaining strength across the Ninth Circuit.¹⁰² Largely affected are California's major cities.¹⁰³ Municipalities are being hauled into court over their lack of services, or quality of services, provided to homeless people.¹⁰⁴ Some cities have had to put enforcement of their anti-camping statutes on hold as they wait for additional shelters to open.¹⁰⁵ Others have sought ways around

97. *Id.* at 606.

98. *See, e.g., 2020 Long Range Weather Forecast for Boise ID*, OLD FARMER'S ALMANAC, <https://www.almanac.com/weather/longrange/ID/Boise#> (last visited Jan. 16, 2020).

99. *Martin*, 920 F.3d at 606.

100. *Id.* at 615.

101. *Id.* at 617; *see also* Aitken v. City of Aberdeen, 393 F. Supp. 3d 1075, 1081–82 (W.D. Wash. 2019) (noting “[i]n keeping with *Martin*'s self-proclaimed restraint, courts have been reluctant to stretch the ruling beyond its context of total homelessness criminalization,” and “*Martin* does not limit the City's ability to evict homeless individuals from particular public places”).

102. *See generally* Waskowicz, *supra* note 5.

103. Greenstone, *supra* note 6.

104. *Id.*

105. *Id.*; *see also* Patrick Sisson, *Homeless People Gain 'De Facto Right' to Sleep on Sidewalks Through Federal Court*, CURBED (Dec. 16, 2019), <https://www.curbed.com/2019/4/5/18296772/supreme-court-homeless-lawsuit-boise-appeals-court> (noting that in Portland, San Francisco, and Sacramento, enforcement of anti-camping statutes was put on hold in the aftermath of *Martin*).

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the decision.¹⁰⁶ What is certain is that *Martin* is forcing municipal reactions that vary greatly throughout the Ninth Circuit, some much more progressive than others.

One municipal response to *Martin*, which falls short of a lasting solution, has been to allocate camping zones for unsheltered people. For instance, the City of San Clemente, California, adopted an ordinance prohibiting tent camping in public,¹⁰⁷ except within a designated area.¹⁰⁸ The specified area—just under one-third of an acre—is only about one-fourth the size of an American football field.¹⁰⁹ The City regulates this camping zone at its discretion.¹¹⁰ In order to sleep in the designated encampment, individuals must register with an on-site security guard by providing their names and the location of their most recent residence.¹¹¹ San Clemente also enforces time restrictions within the encampment, including that “[t]ents may only be erected between the hours of 5 pm and 10 am, daily,” and enforces a “quiet time” between ten at night and seven in the morning.¹¹² The harsh restrictions and constricted area render this solution inadequate.

The City of San Diego undertook a similar response. Since the *Martin* decision, San Diego has partnered with the Jewish Family Service of San Diego, a nonprofit organization, to expand the city's

106. For example, Berkeley City Council “passed a law banning placement of ‘objects’ that prevent use of ‘any portion’ of sidewalks — a change advocates say was against the spirit of the ruling.” Greenstone, *supra* note 6.

107. “Camping,” as defined by the ordinance, means “to pitch or occupy ‘camp facilities’ or to use ‘camp paraphernalia’” including tent shelters. SAN CLEMENTE, CAL., Ordinance No. 1674 § 2.

108. San Clemente specifically designated property to be “made available as the sole public area in the City available for camping purposes by those persons experiencing homelessness or otherwise unable to obtain shelter.” *Id.* at § 4.

109. An American football field is approximately 1.32 acres. *See Acre*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Acre> (last visited Oct. 13, 2019).

110. “The City may adopt rules and regulations for the occupancy, use, and operation of the camping area and conduct therein.” SAN CLEMENTE, CAL., Ordinance No. 1674 § 5.

111. CITY OF SAN CLEMENTE, COMMUNITY SAFETY PLAN, STANDARD OPERATING PROCEDURES, <https://www.san-clemente.org/home/showdocument?id=54216> (last visited Nov. 15, 2019).

112. *Id.*

Safe Parking Program.¹¹³ It opened a new “safe parking lot,” where homeless individuals living in their vehicles may park overnight.¹¹⁴ It is the third of its kind within the city’s limits.¹¹⁵ “The program operates seven nights per week at three secured lots” throughout San Diego.¹¹⁶ In a recent news release, San Diego Mayor Kevin Faulconer advocated for the program, stating “[t]he Safe Parking Program helps [homeless] individuals find a stable place to stay while they access services, look for a job and, ultimately, find a permanent place to call home.”¹¹⁷ The City of San Diego hopes to assist approximately three hundred individuals and families every night through its Safe Parking Program.¹¹⁸

However, like San Clemente’s designated camping zones, San Diego’s Safe Parking Lots are not without criticism. In a 2017 lawsuit against the city, a class of homeless plaintiffs heavily criticized the Safe Parking Lots.¹¹⁹ The complaint filed against the City of San Diego alleged that “the few ‘safe lots’ established in San Diego [can] only serve a small portion of people with vehicles who are homeless, [and

113. Chris Jennewein, *Overnight RV Parking for Homeless San Diegans Officially Opens in Mission Valley*, TIMES OF SAN DIEGO (June 27, 2019), <https://timesofsandiego.com/life/2019/06/27/overnight-rv-parking-for-homeless-san-diegans-officially-opens-in-mission-valley/>. See generally *Safe Parking Program*, JEWISH FAMILY SERV., <https://jfssd.org/our-services/adults-families/safe-parking-program/> (last visited Dec. 6, 2018) [hereinafter *Safe Parking Program*] (“The Safe Parking Program provides a welcoming environment, meaningful resources and tools, and dignified support to help families stabilize and transition back into permanent housing. With holistic services focused on basic needs assistance, employment, family wellness, school success, financial education, credit repair, and housing, our goal is to create a pathway out of homelessness while being a support to people where they are now.”).

114. Jennewein, *supra* note 113.

115. *Id.*

116. *Safe Parking Program*, *supra* note 113.

117. *Mayor Faulconer Expands Safe Parking Program for Homeless Individuals: Marks Third City-Funded Safe Parking Lot That Includes Supportive Services & First to Allow Recreational Vehicles*, CITY OF SAN DIEGO (Apr. 16, 2019), sandiego.gov/mayor/news/releases/mayor-faulconer-expands-safe-parking-program-homeless-individuals.

118. *Id.*

119. See generally *Complaint, Bloom v. City of San Diego*, No. 17-cv-2324 (S.D. Cal. Nov. 15, 2017).

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the lots] prioritize families with small children.”¹²⁰ Moreover, while these lots often remain empty, they continue to exclude recreational vehicles (“RVs”), which serve as a common shelter for San Diego’s homeless population.¹²¹ The cost of travel to and from them the safe parking lots is an additional hurdle for many homeless individuals. One such individual commented the gas alone to get to a safe parking lot costs him roughly seven dollars per day.¹²² Additionally, the lots require vehicles to vacate by seven in the morning, another deterrent.¹²³

Although *Martin* directly addresses the physicality of cruel and unusual punishments against a person’s body, its scope also affects the interest homeless people have in their personal property.¹²⁴ The City of San Diego further exemplifies municipal reaction, increasing its storage facilities for homeless people to temporarily store their belongings. While only one such facility currently exists in San Diego, the City has immediate plans to open a new facility and to increase its storage capacity as the need for services demands.¹²⁵ The proposed location of the new facility is several miles away from the city’s downtown area,¹²⁶ but the need for such services is vast at the new location, with many homeless people residing in the surrounding

120. *Id.* at 17–18. Currently, there are only 150 parking spaces available within these lots, which is dwarfed by the amount of homeless people living in vehicles in San Diego. *Id.* at 20.

121. *Id.* at 24.

122. Jonathan Horn, *San Diego’s New Safe Parking Lot Going Largely Unused*, ABC 10 NEWS SAN DIEGO (July 9, 2019), <https://www.10news.com/news/local-news/new-city-safe-parking-lot-going-largely-unused>.

123. *Id.*

124. *Cf.* Ari Shapiro, *Why Some Homeless Choose the Streets Over Shelters*, NPR (Dec. 6, 2012), <https://www.npr.org/2012/12/06/166666265/why-some-homeless-choose-the-streets-over-shelters>.

125. Initially, the City of San Diego agreed to provide fifty bins, and it may increase the number of bins to a maximum capacity of five hundred bins. *See* Settlement Agreement and Stipulation to Continuing Jurisdiction – 28 U.S.C. 636(c) at 6, *Arundel v. City of San Diego*, No. 17CV-01433 (S.D. Cal. Sept. 27, 2019) [hereinafter *Arundel Settlement Agreement*].

126. Priya Sridhar, *City Chooses Proposed Site for New Homeless Storage Facility in District 9*, KPBS (June 26, 2019), <https://www.kpbs.org/news/2019/jun/26/city-chooses-proposed-site-new-homeless-storage-fa/>.

canyons and watershed.¹²⁷ These storage facilities intend to relieve homeless individuals from the burden of constantly guarding their property.¹²⁸ Proponents of the storage facilities posit that when homeless individuals are able to safely store their belongings, they are better able to tend to other important matters, such as doctor appointments and job interviews.¹²⁹

In the aftermath of *Martin*, cities within the Ninth Circuit are certainly changing the way they address homelessness.¹³⁰ Municipalities can no longer punish homelessness without providing adequate homeless services, such as designated camping zones, safe parking lots, or storage facilities.¹³¹ But while some view these solutions as assisting homeless people with their daily struggles, others take issue with these approaches. Critics argue these steps are not a lasting means to end homelessness, and that *Martin* has caused more harm than help.¹³²

B. *Martin Under Municipal Scrutiny*

Opponents of *Martin* argue the decision is “far-reaching and catastrophic” in that it “cripple[s] the ability of more than 1,600 municipalities in t[he] health and safety of their communities.”¹³³ Homeless encampments are accused of “contributing to a public health crisis”¹³⁴ because they are often writhe with “vandalism, defecation and

127. Memorandum from Council President Georgette Gomez, Ninth Council District to San Diego Mayor Kevin Faulconer (Aug. 5 2019) (on file with the City of San Diego). San Diego has discretion to relocate the site if they “later need that location for another purpose.” Arundel Settlement Agreement, *supra* note 125, at 7. But, any relocation must be to an area with a “known homeless population where the service is likely to be in demand with reasonably similar access to transit service.” *Id.*

128. See Warth, *supra* note 43.

129. *Id.*

130. See *Martin v. City of Boise*, 920 F.3d 584, 603 (9th Cir. 2019); see also Greenstone, *supra* note 6.

131. See Greenstone, *supra* note 6.

132. See generally GIBSON DUNN, *supra* note 34.

133. CRIM. JUST. LEGAL FOUND., SUMMARIES OF ARGUMENTS, CITY OF BOISE V. MARTIN (Oct. 2, 2019), http://www.crimeandconsequences.com/crimblog/files/documents/Boise_BriefSummaries.pdf.

134. GIBSON DUNN, *supra* note 34, at 4.

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urination, violent assaults and rape, [and] littering.”¹³⁵ Municipalities in turn are forced to bear the burden of managing these problems. San Francisco, for example, “has a dedicated four-person team just to clean feces five days a week . . . and [] contracts with a separate crew to pick up used syringes 12 hours each day.”¹³⁶ In Los Angeles, “[s]anitation officials . . . have requested \$17 million to bring on new staff trained to clean in and around encampments – up from about \$6 million [in 2019].”¹³⁷

What is more, homeless encampments are blamed for “harm[ing] local businesses, tourism, and residents.”¹³⁸ One San Francisco business owner attributes a twenty-five percent decline in his annual revenue to the homeless population surrounding his business.¹³⁹ A small business owner in Los Angeles even received text messages from customers exclaiming that although they liked the business itself, the street on which the business sat was “unacceptable.”¹⁴⁰

Ninth Circuit municipalities are not only facing the exorbitant cost of cleanup, they are also struggling with the cost of maintaining those facilities that have opened in *Martin*'s shadow. The San Diego Housing Commission's 2020 fiscal year budget proposal, for example, dedicated over forty-one million dollars for its Homing Housing Innovations division, an increase of almost nine million dollars from 2019.¹⁴¹ Slightly over one million of those dollars alone will go towards opening additional homeless shelters and storage facilities.¹⁴²

135. *Id.* at 4–5.

136. *Id.* at 5.

137. *Id.* at 6.

138. *Id.* at 8. For example, homeless encampments are hindering the reputation of coastal cities that rely, in large part, on tourism. San Francisco's Vice President of Public Safety for Travel noted that “tourists see . . . waste on the street, the needles—and they're shocked. . . . Unfortunately, they're going back and they're telling their friends and family about that experience and they're not coming back.” *Id.* at 9.

139. *Id.* at 8–9.

140. *Id.* at 9.

141. CITY OF SAN DIEGO, OFF. OF THE INDEP. BUDGET ANALYST, REVIEW OF CITY AGENCIES FY 2020 BUDGETS: SAN DIEGO HOUSING COMMISSION 1 (May 2, 2019), https://www.sandiego.gov/sites/default/files/19_11_review_of_city_agencies_fy_2020_budgets_san_diego_housing_commission_complete_rpt.pdf [hereinafter FY 2020 BUDGETS].

142. *Id.* at 5.

Further, operating costs for these facilities raise sustainability concerns. Currently, San Diego is using the one-time federal funding¹⁴³ it received through the state of California's 2018 Homeless Emergency Aid Program.¹⁴⁴ However, the Housing Commission will be forced to use property reserves generated by its affordable housing properties unless the budget identifies a new revenue source for these programs.¹⁴⁵

IV. THE UNAPPEALING APPEAL TO THE UNITED STATES SUPREME COURT

Due to these challenges, many governments—both inside and outside the Ninth Circuit—wanted *Martin* overturned.¹⁴⁶ On August 22, 2019, the City of Boise filed its Petition for a Writ of Certiorari to the U.S. Supreme Court.¹⁴⁷ Boise asked the Court to decide the Eighth Amendment question of whether “generally applicable laws regulating public camping and sleeping constitutes ‘cruel and unusual punishment.’”¹⁴⁸ The City wanted *Martin* overturned to allow cities throughout the Ninth Circuit to “restore the power of local communities to regulate the use of their streets, parks and other public areas.”¹⁴⁹

143. *Id.* at 3.

144. See Alexander Nguyen, *City Council Approves \$14.1 Million Block Grant Allocation for Homelessness*, TIMES OF SAN DIEGO (Dec. 4, 2018), <https://timesofsandiego.com/politics/2018/12/04/city-council-approves-14-1-million-block-grant-allocation-for-homelessness/>.

145. FY 2020 BUDGETS, *supra* note 141, at 6. That money, according to the Housing Commission, should instead be used for “capital improvements, enhancements, and major repairs” of these properties and to “purchase new affordable housing.” *Id.*

146. Some argue “[t]he Ninth Circuit’s ruling in the *Martin* case threatens to undermine a wide array of municipal quality-of-life laws.” John Hirschauer, *Why Didn’t the Supreme Court Take This Homelessness Case?*, NAT’L REV. (Jan. 8, 2020), <https://www.nationalreview.com/2020/01/why-didnt-the-supreme-court-take-this-homelessness-case/>.

147. SCOTUSBLOG, *supra* note 7. See generally *Petition*, *supra* note 8.

148. SCOTUSBLOG, *supra* note 7.

149. Hayley Harding, *Boise Officially Asks U.S. Supreme Court to Hear Homeless Camping Case*, IDAHO STATESMAN (Aug. 22, 2019), <https://www.idahostatesman.com/news/local/community/boise/article234271652.html> (quoting Boise Mayor David Bieter). The city of Boise had hired Gibson Dunn’s Theane Evangelis and Ted Olson as lead counsel, both of whom have been extensively

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Boise alleged *Martin* undermined the government's ability to uphold public health and safety and left no workable means to enforce its protectionary laws.¹⁵⁰ The *Martin* decision, it further argued, is *not* reconcilable with *Robinson* and *Powell*.¹⁵¹

The City of Boise had major support behind its petition. Among the amici curiae were the Ninth Circuit cities of Aberdeen, Washington; the cities comprising Orange County, California; and the City of Los Angeles, California.¹⁵² The state of Idaho also supported its capitol's petition.¹⁵³ Additionally, the states of Alaska, Indiana, Louisiana, Nebraska, South Dakota, and Texas filed amici curiae briefs expressing concern with the precedent set by *Martin*.¹⁵⁴

Advocates for the homeless, including *Martin*'s Respondents, asked the Court to deny Boise's Petition.¹⁵⁵ Respondents argued the Ninth Circuit decision does not impede on cities' abilities to enforce public-camping laws.¹⁵⁶ Nor does the decision mandate shelter be provided for homeless people to carry out *all* involuntary conduct in public.¹⁵⁷ Rather, the decision only pertains to shelter for sleeping.¹⁵⁸

The City of Boise claimed its case was an attractive one for the U.S. Supreme Court.¹⁵⁹ Generally, when deciding whether to exercise its

involved with the U.S. Supreme Court in their pasts, costing the city three hundred thousand dollars. *Id.*

150. *See* Petition, *supra* note 8, at 26–35.

151. *Id.* at 13–19.

152. *See* SCOTUSBLOG, *supra* note 7.

153. *Id.*

154. *Id.*

155. *See generally* Brief in Opposition, City of Boise, Idaho v. Martin, No. 19-247 (U.S. 2019).

156. Respondents argue the City of Boise mischaracterizes the Ninth Circuit decision. *See id.* at 13–14. The Eighth Amendment prohibition on its anti-camping statute does not prevent the City from enforcing the law on any person unless it provides shelter for all people. *Id.* It only means it must provide shelter unless no other shelter is available for that person. *Id.* Under these circumstances, alternative shelter could be privately run, or even afforded by the individual. *Id.* Respondents argue the decision does not mandate the City make shelter available for all homeless people. *Id.*

157. *Id.* at 14.

158. *Id.*

159. *See* Lee Baxter, *U.S. Supreme Court to Decide Whether to Review Ninth Circuit Ruling on Homeless Campers*, ALASKA LANDMINE (Nov. 7, 2019),

discretion to hear a case, the Court considers several factors.¹⁶⁰ First, the Court asks whether its decision would cure a split amongst circuits on a particular issue.¹⁶¹ The second factor is whether a state supreme court's decision conflicts with a decision from another state's supreme court or a U.S. Court of Appeals circuit decision.¹⁶² The third consideration is whether the question *should* be answered by the Supreme Court because of its nature, or whether a lower court's decision conflicts with a U.S. Supreme Court decision.¹⁶³

On December 16, 2019, without comment, the U.S. Supreme Court denied Boise's Petition, leaving the Ninth Circuit's decision in place.¹⁶⁴ The Court's ruling "carries national influence" and "also means that homeless individuals . . . can [] proceed with their constitutional claims against [municipalities]."¹⁶⁵ The Court's denial pleased homeless advocates who hope *Martin* "will help communities find the political will to put [] housing in place," emphasizing, "[h]ousing, not handcuffs, is what ends homelessness."¹⁶⁶ Despite compelling arguments regarding *Martin*'s effects on public health and safety, homeless advocates stress that "[p]ublic health and public safety are best maintained by making sure everyone has an adequate place to live, not by putting homeless people in jail or giving them fines and fees they can't pay."¹⁶⁷

The U.S. Supreme Court's denial of Boise's petition was proper for three reasons. First, *Martin* bolsters the ability of homeless people to

<https://alaskalandmine.com/landmines/u-s-supreme-court-to-decide-whether-to-review-ninth-circuit-ruling-on-homeless-campers/>.

160. See generally U.S. SUP. CT. R. 10.

161. See U.S. SUP. CT. R. 10(a). This factor was certainly present, as the First, Fourth, and Seventh Circuits had all upheld anti-camping statutes as constitutional. See Petition, *supra* note 8, at 21.

162. See U.S. SUP. CT. R. 10(b).

163. See U.S. SUP. CT. R. 10(c).

164. See *City of Boise, Idaho v. Martin*, 140 S. Ct. 674 (2019); see also Karianna Barr, *Supreme Court Lets Martin v. Boise Stand: Homeless Persons Cannot Be Punished for Sleeping in Absence of Alternatives*, NAT'L LAW CTR. ON HOMELESSNESS & POVERTY (Dec. 16, 2019), <https://nlchp.org/supreme-court-martin-v-boise/>.

165. Barr, *supra* note 164.

166. *Id.*

167. *Id.*

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advocate for themselves by reinforcing the Eighth Amendment as a vehicle to challenge the constitutionality of discriminatory laws. Second, letting *Martin* stand keeps incentives in place for municipalities to work towards lasting solutions to the homeless crisis. And third, by refusing to hear the case, the Court does not intrude into the problem-solving social experiments taking place across the Ninth Circuit.

A. *Martin Empowers Advocacy for the Homeless*

The *Martin* decision reestablishes the Eighth Amendment as an advocacy tool for indigent people within the reach of the Ninth Circuit. In light of this success, homeless people may consider other constitutional challenges to anti-homeless laws.¹⁶⁸ However, neither homelessness nor indigency are subject to heightened scrutiny under the Equal Protection Clause.¹⁶⁹ This seems counterintuitive as indigency and homelessness share many of the same characteristics as other classes safeguarded by strict scrutiny, such as immutability, a weak advocacy ability, and a history of discrimination.¹⁷⁰ Without heightened scrutiny, laws that discriminate against homelessness will survive equal protection challenges if they “advance a legitimate government interest,” which is a relatively low bar.¹⁷¹ The precedent set by *Martin* equips homeless people with a stronger constitutional weapon.

168. *Martin*'s reasoning could arguably apply to anti-panhandling ordinances, loitering measures, sweeps, curfew laws, and restrictions on feedings. *A Dream Denied*, *supra* note 40.

169. See U.S. CONST. amend. XIV, § 1 (stating a state may not “deny to any person within its jurisdiction the equal protection of the laws”); *but see* Shapiro v. Thompson, 394 U.S. 618, 638 (1969).

170. See U.S. v. Carolene Products Co., 304 U.S. 144, 154 n.4 (1938) (noting consideration of heightened scrutiny may inquire whether there is “prejudice against discrete and insular minorities”); *see also* Massachusetts Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976) (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973)) (defining a “suspect class” as one “saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process”).

171. *Romer v. Evans*, 517 U.S. 620, 632 (1995).

Not only does *Martin* add to the arsenal of homeless advocates, the success of the Eighth Amendment challenge inspires other constitutional checks against discriminatory legislation. For example, advocates are now using the Fourth Amendment right to be free from unreasonable searches and seizures¹⁷² to challenge the criminalization of homelessness. A July 2019 class action filed against the City of Los Angeles alleges Fourth Amendment violations where city sanitation crews seized and destroyed personal property left on the sidewalk while the property's homeless owners were steps away.¹⁷³ The precedent set by *Martin* demonstrates the Ninth Circuit Court of Appeals is unafraid to expand the rights of homeless individuals in new and different ways.

B. Martin Demands Innovative Problem-Solving

In response to *Martin*, many municipalities are striving¹⁷⁴ to address the needs of their homeless populations.¹⁷⁵ Unquestionably, lawsuits against cities following *Martin* have triggered the opening of many new services and facilities to aid homeless individuals.¹⁷⁶ And while some cities may seem acrimonious, the ideas and efforts resulting

172. See U.S. CONST. amend. IV.

173. The law being challenged is Los Angeles Municipal Code section 56.11, which allows the city to seize and destroy homeless individuals' belongings, the purpose of which is to "balance the needs of all the City's residents." Complaint at 8, *Garcia v. City of Los Angeles*, No. 2:19-cv-06182 (C.D. Cal. July 18, 2019) (quoting L.A., CAL. MUN. CODE § 56.11). See generally First Amended Complaint, *Garcia v. City of Los Angeles*, No. 2:19-cv-06182 (C.D. Cal. Sept. 23, 2019).

174. Albeit, hesitantly and perhaps even forced.

175. See, e.g., Benjamin Oreskes, *Homeless People Could Lose the Right to Sleep on Sidewalks if Western Cities Have Their Way*, L.A. TIMES (Sept. 25, 2019), <https://www.latimes.com/california/story/2019-09-25/boise-homeless-encampment-amicus-brief-supreme-court-appeal-cities> (discussing Sacramento's Mayor Darrell Steinberg's opposition to Sacramento's amici brief in support of the United States Supreme Court taking *Martin*). The mayor praises the efforts made to build an "Outdoor Emergency Shelter" in Modesto, which provides three hundred tents for four hundred homeless people, even though, the mayor admits, "Boise was the impetus for them – for both the city and the county – to work much more closely together and be more aggressive about creating capacity in beds for their unsheltered homeless population." *Id.*

176. See generally *id.*

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from such suits are making significant impacts on the lives of homeless individuals.¹⁷⁷

For example, San Diego's new storage facility manifested from a settlement agreement following a suit against the city.¹⁷⁸ The lawsuit's class of homeless plaintiffs challenged the constitutionality of encroachment enforcement.¹⁷⁹ Prior to the settlement agreement, only one other municipally-operated facility existed in San Diego.¹⁸⁰ That single storage facility, which opened in 2018, had reached capacity.¹⁸¹ The lawsuit achieved a desirable result: expanding a municipal service that was clearly in high demand.

Cities are not only having to adjust their services; they are also reconsidering their punishments and practices. As part of the settlement with the City of San Diego mentioned above, the City amended police protocol for enforcing its encroachment statute.¹⁸² The revised protocol gives police officers discretion to use progressive enforcement for encroachment violations.¹⁸³ Upon each violation, police officers must now offer services to encroachers, such as storage and shelter bed

177. See Dan Vogel, *Homelessness: A National Problem with a Local Solution*, USA TODAY (Oct. 30, 2019), <https://www.usatoday.com/story/opinion/2019/10/30/homelessness-california-los-angeles-san-francisco-problem-local-solution-column/2487071001/>.

178. Initially, the City of San Diego agreed to provide fifty bins, but may increase the number of bins to a maximum capacity of five hundred. See Arundel Settlement Agreement, *supra* note 125, at 6.

179. *Id.* at 3–4.

180. That facility opened in 2018 and is located near the city's downtown area, and near the nonprofit organization, Think Dignity. Think Dignity operates a Transitional Storage Center, the only other storage facility in San Diego where homeless people may store their personal belongings. See Warth, *supra* note 43; see also *Our Mission*, THINK DIGNITY, <https://www.thinkdignity.org/our-mission> (last visited Mar. 19, 2020).

181. Sridhar, *supra* note 126.

182. Arundel Settlement Agreement, *supra* note 125. See generally SAN DIEGO POLICE DEP'T, TRAINING BULLETIN: UNAUTHORIZED ENCROACHMENTS PROHIBITED – SDMC 54.1001 (July 3, 2019) [hereinafter TRAINING BULLETIN].

183. See TRAINING BULLETIN, *supra* note 182, at 3 (indicating the factors officers should consider when using progressive enforcement include “how many times the subject was contacted, how much time transpired between contacts, and where the subject was contacted in the past”).

space.¹⁸⁴ The first violation only results in a warning from police.¹⁸⁵ The second time a person violates the statute, police may issue merely an infraction citation, and only if services are refused.¹⁸⁶ Upon a third violation accompanied by refusal of services, police officers may issue a misdemeanor citation.¹⁸⁷ Only upon the fourth violation and refusal of services may an individual be subject to arrest.¹⁸⁸

The many lawsuits inspired by *Martin*'s success are changing the ways municipalities approach homelessness. The focus has shifted from criminalization to providing aid through city services. Rather than banning homelessness, municipalities across the Ninth Circuit now must work to assist homeless people. The hope is that this assistance will provide those who want a way out of homelessness an avenue to do so.

C. Martin Transforms the Ninth Circuit into a Laboratory for Social Experimentation

Finally, *Martin* expounds a concept articulated by the U.S. Supreme Court that "a single courageous State may . . . serve as a laboratory[] and try novel social and economic experiments without risk to the rest of the country."¹⁸⁹ By denying the City of Boise's petition, the U.S. Supreme Court ensured the Ninth Circuit will continue to serve as a laboratory of experimentation where states may test potential solutions to the homeless crisis.¹⁹⁰ Through trial and error, cities must explore new ways to find lasting and effective solutions to homelessness.¹⁹¹ The U.S. Supreme Court must be wary not to intrude into social problem-solving experiments, especially when the issue addressed is particularly relevant within the affected jurisdiction, as homelessness is within the Ninth Circuit.

184. Services are initially offered by police officers who then contact the police department's Homeless Outreach Team. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932).

190. *See generally* Vogel, *supra* note 177.

191. *Id.*

The Ninth Circuit is not the only jurisdiction experimenting with solutions to homelessness. In recent years, there have been nationwide efforts to extend the constitutional rights of the indigent.¹⁹² Other states are achieving success. For example, New York City is the first jurisdiction to recognize a right to counsel for tenants facing eviction proceedings.¹⁹³ Eviction is a major factor of housing instability for low-income people.¹⁹⁴ And New York City has found that tenants' access to counsel directly correlates with a reduction in evictions.¹⁹⁵ In response to the growing eviction problems facing its low-income residents, New York City began phasing in its Right to Counsel program in 2017, which currently only extends to ten percent of New York City's zip codes.¹⁹⁶ But, New York City plans to expand the program to other areas throughout the city by 2022.¹⁹⁷ Since launching its Right to Counsel program, New York City has seen a decrease in eviction filings;¹⁹⁸ and tenants who live within Right to Counsel zip codes are three times more likely to receive legal services than those without access to the program.¹⁹⁹

Another successful experiment came out of Massachusetts' recognition of a fundamental right to shelter.²⁰⁰ In 2017, Massachusetts became the first state—and to date the *only* state—to recognize a right to shelter, even if only for families with children.²⁰¹ Massachusetts

192. See, e.g., *Campaigns*, NAT'L COAL. FOR THE HOMELESS, <https://nationalhomeless.org/campaigns/> (last visited Mar. 19, 2020).

193. *All About the Right to Counsel for Evictions in NYC*, NAT'L COAL. FOR A CIVIL RIGHT TO COUNS. (Feb. 24, 2020), http://civilrighttocounsel.org/major_developments/894.

194. Oksana Mironova, *NYC Right to Counsel: First Year Results and Potential for Expansion*, CMTY. SERV. SOC'Y (Mar. 25, 2019), <https://www.cssny.org/news/entry/nyc-right-to-counsel>.

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. See generally Act Promoting Housing and Support Services to Unaccompanied Homeless Youths, 2014 Mass. Legis. Serv. Ch. 450 (H.B. 4517) (West) (effective Apr. 6, 2015).

201. See "*Right to Shelter*" in Massachusetts, COAL. FOR HOMELESS INDIVIDUALS, <https://chimassachusetts.com/individual-homelessness/right-to-shelter-in-massachusetts/> (last visited Mar. 19, 2020).

guarantees qualifying families²⁰² a “[f]ixed, regular nighttime residence,” defined as “a dwelling at which a person resides on a regular basis that provides safe shelter, sufficient for meeting both the physical and psychological needs typically met in home environments.”²⁰³ The state contracts with nonprofit organizations to make four types of shelter available: (1) congregate shelters, at which a family has its own room, but shares its bathroom, kitchen, and living area with other families; (2) scattered-site shelters, which are apartments rented by the state; (3) co-shelters, which are apartments shared by two to three other families; and (4) hotels and motels, used as overflow when other shelter is unavailable.²⁰⁴

California’s homeless crisis is far worse than in any other state.²⁰⁵ Consequently, in the short time following the Ninth Circuit’s decision in *Martin*, California especially has been forced to reconsider how it address homelessness. Like the right to counsel for tenants facing eviction in New York City, and the fundamental right to shelter for families with children recognized in Massachusetts, the programs arising out of Eighth Amendment protections against anti-camping statutes need time and a chance to develop.

202. To be eligible, families must “fall below 115% of the poverty line, prove their homelessness status, and be homeless due to one of four conditions: domestic violence, disaster, eviction, [or] health and safety.” Lucy Ellis, *Massachusetts Family Homelessness System – City of Ideas*, BOS. FOUND. (Feb. 22, 2017), <https://www.tbf.org/old-blog/2017/february/massachusetts-family-homelessness-system>.

203. “‘Fixed, regular nighttime residence’ shall not include: (i) a publicly or privately-operated institutional shelter designed to provide temporary living accommodations; (ii) transitional housing; (iii) temporary placement with a peer, friend or family member who has not offered a permanent residence, residential lease or temporary lodging for more than 30 days; or (iv) a public or private place not designed for or ordinarily used as a regular sleeping accommodation for human beings.” See Act Promoting Housing and Support Services to Unaccompanied Homeless Youths, 2014 Mass. Legis. Serv. Ch. 450, § 16W(a) (H.B. 4517) (West) (effective Apr. 6, 2015).

204. Ellis, *supra* note 202.

205. See generally AHAR, *supra* note 11.

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AND IT'S BEGINNING TO SNOW

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CONCLUSION

“Homelessness is a complex, controversial issue”.²⁰⁶ The Ninth Circuit decision of *Martin v. City of Boise* offers no easy answer. But it does demand that an answer be sought.²⁰⁷ No longer can municipalities ignore the problem by banning homelessness.

As a result of *Martin*, the Eighth Amendment’s Cruel and Unusual Punishments Clause now serves as a mechanism within the Ninth Circuit for homeless people to advocate against laws that criminalize their status. Additionally, the decision builds upon the social trend to expand constitutional protections for the indigent. Finally, *Martin* has created a surge of social experimentation in the search for a solution and could very well be the catalyst needed for change. By denying the City of Boise’s appeal in *Martin*, the U.S. Supreme Court enabled this important social experimentation to continue.

So, what happens to a person when there is nowhere to go, and it’s beginning to snow? *Martin* may not completely answer that question, at least as of yet. But, it does allow a homeless person a tent when there is nothing else; and, more importantly, it gives municipalities an incentive to affect change.

*Morgan Chandegra**

206. Hannah Kieschnick, Note, *A Cruel and Unusual Way to Regulate the Homeless: Extending the Status Crimes Doctrine to Anti-Homeless Ordinances*, 70 STAN. L. REV. 1569, 1619 (2018).

207. See Greenstone, *supra* note 6.

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